Tiger Powerhitz Sdn Bhd v Guinness Anchor Marketing Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–22–509 OF 2000
ARIFIN ZAKARIA J
7 JUNE 2002

Civil Procedure *— Contempt of court — Order of commital, application for — Committal proceedings — Body corporate — Whether the alleged contemnor had notice of the order as provided in O 45 r 7(3)(a) of the Rules of the High Court 1980 — Non-indorsement of notice as required under O 24 r 7(4) of the Rules of the High Court 1980 — Whether the court had discretion to nevertheless enforce the order granting leave to issue committal proceedings — Whether court should exercise such discretion — Rules of the High Court 1980 O 24 r 7(4) & O 45 r 7(3)(a)*

The court granted an ex parte injunction order ('the injuction order') prohibiting the defendant, its agents or servants from using the name 'Tiger Powerhitz' in concerts sponsored and carried out by the defendant or in any charity show, event, presentation in any manner carried out by the defendant using the name 'Tiger Powerhitz'. The plaintiff obtained an ex parte order ('the order') for leave to institute contempt proceedings against one of the directors of the defendant ('the alleged contemnor'), for breach of the injunction order. The defendant and the alleged contemnor filed an application to set aside the order.

Held, striking out the plaintiff's motion and allowing the defendant's application:

(1) Order 45 r 7(3)(a) of the Rules of the High Court 1980 ('the RHC') states that an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in O 45 r 5(ii) and (iii) unless a copy of the order has been served personally on the officers against whose property leave is sought to issue a writ of seizure and sale or against whom an order for committal is sought (see p 317C–D).

(2) The alleged contemnor was never personally served with the injunction order and as such the defendant and the alleged contemnor had no notice of the terms of the injunction order. Further, it was common ground that the alleged contemnor was not present when the injunction order was made, nor was he ever notified of the terms of the injunction order, either by telephone, telegram or otherwise (see p 317D–E; *Class One Video Distributors Sdn Bhd & Anor v Chanan Singh all Sher Singh & Anor* [1997] 5 MLJ 209 distinguished.

(3) The injunction order did not contain the proper endorsement as required by O 24 r 7(4) and Form 87 of the RHC. So long as the alleged contemnor had knowledge of the terms of the order, the non-endorsement of the penal notice is not fatal. However, in the

present case, it has been established that the alleged contemnor had no knowledge of the terms of the order (see p 318E–G).

[Bahasa Malaysia summary

Mahkamah telah memberikan satu perintah injunksi ex parte ('perintah injunksi tersebut') yang melarang defendan, ejen-ejen atau pekerja-pekerjanya menggunakan nama 'Tiger Powerhitz' dalam konsert-konsert yang dianjurkan dan diadakan oleh defendan atau dalam mana-mana pertunjukan amal, persembahan dan pertunjukan dalam apa-apa cara yang diadakan oleh defendan menggunakan nama 'Tiger Powerhitz'. Plaintif telah mendapatkan satu perintah ex parte ('perintah tersebut') untuk kebenaran memulakan prosiding penghinaan terhadap salah satu daripada pengarah defendan ('penghina yang dikatakan'), kerana perlanggaran perintah injunksi tersebut. Defendan dan penghina yang dikatakan tersebut telah memfailkan satu permohonan untuk mengenepikan perintah tersebut.

Diputuskan, menolak usul plaintif dan membenarkan permohonan defendan:

(1) Aturan 45 k 7(3)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') menyatakan bahawa satu perintah yang menghendaki satu badan korporat membuat atau menahan daripada membuat satu perbuatan tidak sepatutnya dikuatkuasakan sebagaimana yang disebutkan dalan A 45 k 5(ii) dan (iii) kecuali satu salinan perintah tersebut telah disampaikan secara persendirian ke atas pegawai-pegawai yang mana kebenaran hartanah dipohon untuk mengeluarkan satu writ penyitaan dan jualan atau terhadap mereka satu perintah kerana penghinaan dipohon (lihat ms 317C–D).

(2) Penghina yang dikatakan tersebut tidak pernah disampaikan secara persendirian dengan perintah injunksi tersebut dan oleh itu defendan dan penghina yang dikatakan tersebut tidak mempunyai notis tentang terma-terma perintah injunksi tersebut. Tambahan pula, ia adalah diketahui semua bahawa penghina yang dikatakan tersebut tidak hadir semasa perintah injunksi tersebut dibuat, dan beliau juga tidak pernah dimaklumkan tentang terma-terma perintah injunksi tersebut, sama ada melalui telefon, telegram atau sebaliknya (lihat ms 317D–E); *Class One Video Distributors Sdn Bhd & Anor v Chanan Singh a/l Sher Singh & Anor* [1997] 5 MLJ 209 dibeza.

(3) Perintah injunksi tersebut tidak mengandungi pengindorsan yang betul sebagaimana yang dikehendaki oleh A 24 k 7(4) dan Borang 87 KMT. Selagi penghina yang dikatakan tersebut mempunyai pengetahuan tentang terma-terma perintah tersebut, notis penting yang tidak diindorskan tersebut tidak membawa mudarat. Namun begitu, dalam kes semasa, adalah terbukti bahawa

penghina yang dikatakan tersebut tidak mempunyai pengetahuan tentang terma-terma perintah tersebut (lihat ms 318E–G).] A

Notes

For cases on application for order of commital, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) Paras 1500–1512. B

Cases referred to

Class One Video Distributors Sdn Bhd & Anor v Chanan Singh a/l Sher Singh & Anor [1997] 5 MLJ 209 (distd) C

Datuk Hong Kim Sui v Tiu Shi Kian & Anor [1987] 1 MLJ 345 (refd)

Iberian Trust Ltd v Founders Trust and Investment Co, Ltd [1932] 2 KB 87 (refd)

Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v Md Jaafar bin Abdul Carrim & Anor [1998] 2 MLJ 244 (refd)

Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar [1989] 2 MLJ 281 (refd) D

Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 4) [1998] 7 MLJ 551 (refd)

Legislation referred to E

Rules of the High Court 1980 O 24 r 7(4), O 45 rr 5(ii), (iii), 7(3)(a), Form 87

Mahadevi Nadchatiram (*Shanti Segaram* with her) (*Mahadevi Nadchatiram & Partners*) for the plaintiff. F

Khoo Guan Huat (*Eow Kean Fatt* with him) (*Skrine*) for the defendants.

Arifin Zakaria J: On 24 July 2000, this court granted an ex parte injunction order ('the order') prohibiting the defendant, its agents or servants from using the name 'Tiger Powerhitz' in the following concerts sponsored and carried out by the defendant on: G

(1) 27 July 2000 at Dewan Jubli Intan (Baru) Segamat;

(2) 29 July 2000 at SJK @ Tuan Poon School;

(3) 30 July 2000 at Dewan Raya Gelang Patah, Gelang Patah, Johor; and

(4) 3 August 2000 at Hokkien Association Hulu Klang, H

or in any charity show, event, presentation in any manner carried out by the defendant using the name 'Tiger Powerhitz'. The plaintiff alleged that the defendant failed to comply with the order by:

(1) placing advertisements in *Sin Chew Jit Poh* and *Quang Ming Daily* on 27 July 2000; and I

(2) publishing a magazine entitled *Tiger Powerhitz* on 28 July 2000.

On 30 November 2001, the plaintiff obtained an ex parte order from this court for leave to institute contempt proceedings against Micheal Daniel Van Der Poel, one of the directors of the defendant company, for breach of the order.

On 24 January 2002, the defendant and Micheal Daniel Van Der Poel ('the alleged contemnor') filed an application (encl 47) to set aside the order dated 30 November 2001. The said application and the plaintiff's notice of motion were heard together. After hearing submissions of counsel for the parties, I allowed the said application with costs and struck out the plaintiff's notice of motion with no order as to costs.

My grounds for allowing the defendant's and the alleged contemnor's application are as follows.

The alleged contemnor was not personally served with a copy of the order

Order 45 r 7(3)(a) of the Rules of the High Court 1980 ('the RHC') states that an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in O 45 r 5(ii) and (iii) unless a copy of the order has been served personally on the officers against whose property leave is sought to issue a writ of seizure and sale or against whom an order for committal is sought. It was contended for the defendant and the alleged contemnor that the defendant and the alleged contemnor were never personally served with the order and as such the defendant and the alleged contemnor had no notice of the terms of the order. Further, it is common ground that the alleged contemnor was not present when the order was made, nor was he ever notified of the terms of the order, either by telephone, telegram or otherwise. It is also not in dispute that the alleged contemnor was away in Australia on his annual leave during the period between 18 July 2000 to 8 August 2000 during which the order was made by the court. Thus, on the facts before me, I find that the plaintiff failed to satisfy this court that the alleged contemnor had been notified of the terms of the order by telephone or telegram or he was otherwise made aware of the terms of the order.

In his submission, the learned counsel for the plaintiff sought to rely on the case of *Class One Video Distributors Sdn Bhd & Anor v Chanan Singh a/l Sher Singh & Anor* [1997] 5 MLJ 209, where at p 216 Haidar J (as he then was) said:

> In this case, though the order was not personally served on the second defendant, I am satisfied that the second defendant — having had the benefits of counsel's advice — is deemed to know the terms of the order. In any event, the second defendant did not deny that he had knowledge of the terms of the order. The word 'otherwise' in r 7(6) would be wide enough to cover this situation.

I find that the facts of the abovementioned case can be distinguished from the present case as the alleged contemnor here had categorically denied knowledge of the terms of the order and further he had also expressly stated in his affidavit (encl 46) that he was not notified by his solicitors of the terms of the order.

Similarly with the Privy Council case of *Datuk Hong Kim Sui v Tiu Shi Kian & Anor* [1987] 1 MLJ 345 which was cited by counsel for the plaintiff. In that case, the solicitors wrote to the client (alleged contemnors) about the terms of the order. However, the alleged contemnors chose not to abide by the injunction order. Moreover the second injunction order was served on the company 'Red Rose' on the same day.

As Sir Ivor Richardson stated at p 347:

> Thus the Rules recognize that directors and officers are the human agencies responsible for the conduct of the affairs of companies. They fix a director with liability for the conduct of the company and so with liability for any breach by the company of an injunction *where the director has appropriate notice* that he is liable to process of execution if the company disobeys the order. (Emphasis added.)

In the present case, there is no evidence before the court indicative of the fact that the director had any appropriate notice of the order.

For the above reasons, it is my finding that the alleged contemnor had not personally been served with the order, nor had he been given the appropriate notice. Therefore, in the circumstances, I hold that he could not be held liable for contempt of the order.

There was no proper penal endorsement

It is not in dispute that the order does not contain the proper endorsement as required by O 24 r 7(4) and Form 87 of the RHC. The plaintiff contended that this was not fatal to the application. The case of *Class One Video Distributor Sdn Bhd* was cited in support of his contention.

In that case Haidar J at p 216 stated:

> In the circumstances I am of the view that, following *Allport Alfred James* [[1989] 1 MLJ 388], which cited with approval the English case of *Sofroniou* [(1991) FCR 322], the defect in not complying with the indorsement of the penal notice is not fatal so long as the second defendant *had knowledge* of the terms of the order. (Emphasis added.)

What can be discerned from that case is that so long as the alleged contemnor had knowledge of the terms of the order, the non-endorsement of the penal notice is not fatal. However, in the present case it has been established that the alleged contemnor had no knowledge of the terms of the order. Therefore, the authority cited could not support the plaintiff's argument.

In this context, reference should also be made to the case of *Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 4)* [1998] 7 MLJ 551, there Abdul Malik Ishak J at p 558 states in no uncertain terms:

> Different penal notices should be used in cases of mandatory and prohibitory orders and also in a case where the order is against an individual or a corporation. In the case of an order against a company or a corporation, the penal notice must be specific and should name all the directors and officers of

A the company or corporation and that order should be served on each and every person named in the penal notice.

I wholly agree with the view of the learned judge and for the same reasons the court order of 30 November 2001 ought to be set aside.

B *Ambiguity in the order*

It is evident that the purpose of the order was to restrain the defendant from using the name of 'Tiger Powerhitz' in the Tiger Powerhitz Charity Show Concerts held between 27 July 2000 to 3 August 2000 at the specified venues. It is contended for the defendant and the alleged contemnor that C the order did not expressly state that the defendant is restrained from advertising the same or publishing the Tiger Powerhitz magazines. It is argued that in view of the apparent ambiguity in the order, therefore, the defendant and the alleged contemnor could not be held liable for the alleged breach of the order.

D In the case of *Iberian Trust Ltd v Founders Trust and Investment Co, Ltd* [1932] 2 KB 87, Luxmore J stated at p 95:

> From this it appears that in order to constitute a contempt of court for which the directors may be punished there must be wilful disobedience either by the company or its servants or directors to do something which it has been ordered to do. Now, turning back to Rowlatt J's order, what is it that the defendant E company have been ordered to do which the company and its directors have failed to do? In terms, the order does not direct the defendant company to do anything — it says: 'that the plaintiffs do have a return of the said shares within fourteen days.' Am I to spell out of that an order on the defendant company to do something? I think not. If the court is to punish anyone for not carrying out its order, the order must in unambiguous terms direct *what is to be done.* F (Emphasis added.)

The same principle has been adopted in the case of *Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v Md Jaafar bin Abdul Carrim & Anor* [1998] 2 MLJ 244 where his lordship Nik Hashim J at pp 249–250 stated:

> First and foremost, it must be emphasized that 'committal is a very serious G matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the *alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations*' (per Cross J in *Re B(JA) (An Infant)* [1965] 1 Ch 1112).
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> The rules governing the application for an order of committal is provided for under O 52 of the RHC. Authorities have shown that the procedural rules H must be complied with and be strictly enforced. Lord Denning MR in *McIlraith v Grady* [1968] 1 QB 468 at p 477 said:
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> > '... we must remember the fundamental principle that no man's liberty is to be taken away unless every requirement of the law has been strictly complied with ... .'
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> ...
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> I It is also the law that the grounds on which an order of committal is sought must be set out in the statement accompanying the notice of motion (see O 52 rr 2(2) and 3(3)). Although there is no requirement for the notice of motion to

> set out the grounds, nevertheless this information must be stated in the statement with sufficient particularity to enable the person alleged to be in contempt to meet the charge .... The nature of the contempt must be identified and spelt out precisely. The person alleged to be in contempt must know what exactly he is said to have done or omitted to do which constitute a contempt of court (see *Chiltern District Council v Keane* [[1985] 2 All ER 118]).

In the present case, I am satisfied that even though the order did not expressly mention the acts complained of it is, however, clear from its terms that the defendant is to be restrained from using the name 'Tiger Powerhitz'. Therefore, in my opinion, it is not open to the defendant to argue that the advertisements and the publication of Tiger Powerhitz magazine fall outside the ambit of the order. However, I am satisfied with the explanation given by the defendant that all the necessary measures and steps that need to be taken were taken by the defendant to ensure compliance with the order the moment defendant was made aware of the order but due to shortage of time, the advertisements in both *Sin Chew Jit Poh* and *Quang Ming Daily* on 27 July 2000 and the publication of the magazine on 28 August 2000 could not be stopped. The detailed explanation is found in paras 25, 32 and 34 of the affidavit of the alleged contemnor in encl (53).

Delay

The other factor to be considered is the delay in making the application by the plaintiff. In this case there was a delay of almost 15 months by the plaintiff in filing the application for leave to institute committal proceedings. The plaintiff did not offer any explanation for the delay.

In the case of *Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar* [1989] 2 MLJ 281, the Supreme Court stated that contempt is a serious matter and should be pursued within a reasonable time. In that case, it was held that a lapse of nearly nine months was an inordinate delay. In the present case, there was a delay of 15 months and no explanation was given by the plaintiff. In the circumstances, I find that there has been an inordinate delay on the part of the plaintiff. This is clearly another factor which weighs against the plaintiff.

Conclusion

In the light of the above, I am of the considered view that the defendant's and the alleged contemnor's application to set aside the leave granted to the plaintiff to commence committal proceedings against the alleged contemnor ought to be allowed, and for the same reasons, the plaintiff's substantive motion for committal be struck out. With regard to costs, I order that the costs of this application to be paid by the plaintiff to the defendant and there will be no order as to costs as regards the plaintiff's motion for committal.

Plaintiff's motion struck out, defendant's application allowed.

Reported by Peter Ling